

**BEFORE THE DIRECTOR OF THE
DEPARTMENT OF PESTICIDE REGULATION
STATE OF CALIFORNIA**

In the Matter of the Decision of
the Agricultural Commissioner of
the County of Los Angeles
(County File No. 12131022)

Administrative Docket No. 200

DIRECTOR'S DECISION

Paul Lofthouse
100 South Main Street
Los Angeles, CA 90012

Appellant/

Procedural Background

Under California Food and Agricultural Code (FAC) section 12999.5, county agricultural commissioners may levy a civil penalty up to \$5,000 for violations of California's pesticide laws and regulations. When levying fines, the Commissioner must follow fine guidelines established in California Code of Regulations (CCR), Title 3, section 6130, and must designate each violation as Class A, Class B, or Class C. Each classification has a corresponding fine range.

After giving notice of the proposed action and providing a hearing on November 13, 2013, the Los Angeles County Agricultural Commissioner (Commissioner) found that appellant Paul Lofthouse (appellant or Lofthouse) —a licensed pest control adviser (PCA)—violated FAC section 11791 in connection with a pest control recommendation written to the California Department of Transportation (Caltrans) for a pesticide application to Caltrans Cost Center 712. The Commissioner found that appellant operated in a faulty, careless, or negligent manner by writing the recommendation without first inspecting the application site for any potential damage that could occur due to the pesticide application. The Commissioner classified this violation as a Class A violation and levied a \$2,500 fine.

Lofthouse appeals the Commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation (DPR). The Director has jurisdiction to review the appeal under FAC section 12999.5.

Standard of Review

The Director decides the appeal on the record before the Hearing Officer. In reviewing the commissioner's decision, the Director looks to see if there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the Commissioner's decision. The Director notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions might also have been reached. In making the substantial evidence determination, the Director draws all reasonable inferences from the information in the record to support the findings, and reviews the record in the light most favorable to the commissioner's decision. If the Director finds substantial evidence in the record to support the commissioner's decision, the Director affirms the decision.

Factual Background

On October 17, 2011, Lofthouse issued pest control recommendation #101911 for Caltrans District 7, Cost Center 712 (Recommendation). (Respondent Exhibit 1-A.) At the time, Lofthouse was employed by Caltrans and possessed a valid PCA license, no. 73989. (Stipulations 1, 2.) Lofthouse's official duties at Caltrans included writing pest control recommendations for property along more than 1100 miles of freeway, including Cost Center 712. (Stipulation 3.) Cost Center 712 is a geographical subunit of Caltrans District 7 that covers 366 acres of property along 28 linear miles of Interstates 10 and 405 and California State Routes 1 and 90. (See Respondent Exhibit 1-A.)

In the Recommendation, Lofthouse recommended the application of Roundup Pro Concentrate (reg. no. 524-529-AA), Matrix SG (reg. no. 352-768-AA), and Milestone VM (reg. no. 62719-537-AA) to treat specified target pests. The Recommendation includes a "Restrictions/Limitations" section that provides multiple pages of language taken from the labels of the recommended pesticides. The Recommendation includes language from the Milestone VM label stating that "[trees] adjacent to or in a treated area can occasionally be affected by root uptake of Milestone VM. Do not apply Milestone VM within the root zone of desirable trees unless such injury can be tolerated." The statement "READ THE LABEL" is included on each page of the Recommendation. (Respondent Exhibit 1-A.)

On June 14, 2012, a Culver City employee contacted the Commissioner's office to report that ten mature Chinese Elm trees along the 3800 block of Globe Avenue in Culver City, California (Globe Avenue site) had died or were damaged. The Culver City employee suspected that the trees were damaged as the result of an herbicide application by Caltrans to an adjacent right-of-way. (County Exhibit E.) The Globe Avenue site abuts a Caltrans right-of-way running along Interstate 405 and is located within Cost Center 712. (County Exhibit M.)

The Commissioner's office conducted an investigation of the incident. County Inspectors J. Kovacevich (Ms. Kovacevich) and A. Ganser (Ms. Ganser) and Deputy Commissioner R. Sokulsky (Mr. Sokulsky) conducted interviews, inspected the Globe Avenue site, and documented their findings in the Pesticide Episode Investigation Report (PEIR). On June 21, 2012, Ms. Kovacevich and Mr. Sokulsky visited the Caltrans Maintenance Yard responsible for Cost Center 712 and obtained daily chemical use report records for Cost Center 712. Those records showed that Caltrans applied Matrix SG and Milestone VM to Cost Center 712 on March 2, 8, and 23, 2012. (County Exhibit I.)

On June 27, 2012, Dr. Jerry Tuney, a plant pathologist and certified arborist employed by the County reviewed photographs from the Globe Avenue site and concluded that the damage was caused by herbicide. (County Exhibit L.) On July 17, 2012, Ms. Kovacevich and Ms. Ganser collected soil and foliar samples from the Globe Avenue site. The samples tested positive for aminopyralid—the active ingredient of Milestone VM. (County Exhibit N; Stipulation 5.) The County contacted Lofthouse to request the pest control recommendation for the Globe Avenue site. On June 25, 2012, Lofthouse replied by e-mail stating that "Caltrans doesn't write site specific pest control recommendations" and attached a portion of the Recommendation. (County Exhibit J.) The PEIR concluded that Lofthouse violated FAC section 11791 and the County issued violation notice number V060-009-12/13. (County Exhibit D.)

On July 8, 2013, the Commissioner issued a Notice of Proposed Action (NOPA), charging Lofthouse with violating FAC section 11791 for writing a pest control recommendation without first inspecting the site for any potential damage that could occur due to a pesticide application. Lofthouse requested a hearing. On November 13, 2013, the hearing was held before Robert G. Atkins, a hearing officer designated by the Commissioner.

The Hearing Officer's Decision

At the hearing, the Hearing Officer received both oral and documentary evidence, and the County and appellant had the opportunity to present evidence and question witnesses. The

Hearing Officer upheld the violation charged in the NOPA by finding that there was sufficient evidence to show that Lofthouse wrote the Recommendation without first inspecting the Globe Avenue site.

Appellant's Allegations

Lofthouse appeals the Commissioner's decision that Lofthouse violated FAC section 11791, and does not challenge the classification of the violation as a Class A violation or the fine amount. Lofthouse argues that:

1. The Commissioner's decision violated appellant's due process rights by concluding that appellant committed a violation that was not charged in the NOPA.
2. There is no explicit statutory requirement that PCAs inspect a site prior to writing a pest control recommendation for that site.
3. Appellant "clearly" and "irrefutably" inspected the Globe Avenue site and the Commissioner's finding that appellant wrote the Recommendation without first inspecting the Globe Avenue site is not supported by the record or law.
4. In writing the Recommendation, appellant complied with all applicable statutory requirements of a pest control recommendation.
5. The roots of the damaged trees were illegally encroaching and trespassing into Caltrans' right-of-way.
6. The Commissioner's finding relied on an advisory warning for a pesticide product that was not included in the Recommendation.
7. Appellant fulfilled his duties as a Caltrans Landscape Specialist.

Relevant Laws and Regulations

FAC section 11791(b) states:

"It is unlawful for any person subject to this division to do any of the following:

...

(b) Operate in a faulty, careless, or negligent manner."

FAC section 12003 states:

“Agricultural pest control advisers shall put all recommendations concerning any agricultural use in writing.

...

Each written recommendation shall include, when applicable, the following:

...

(f) A warning of the possibility of damages from the pesticide application that reasonably should have been known by the agricultural pest control advisor to exist.”

The Director’s Analysis

1. The Commissioner’s decision concludes that appellant committed the violation charged in the NOPA and satisfies the requirements of due process.

Appellant argues that the Commissioner’s decision concludes that appellant violated FAC section 11791 because a faulty, careless, or negligent application occurred, not—as was charged in the NOPA—that appellant operated in a faulty, careless, or negligent manner in violation of FAC section 11791 because he wrote the Recommendation without first inspecting the site. Appellant argues that upholding the fine would violate due process because the NOPA did not charge him with making a faulty, careless, or negligent application.

Appellant’s argument is unpersuasive. The NOPA alleged a violation of FAC section 11791(b) and the Commissioner found him in violation of that section. The NOPA charged that appellant operated in a faulty, careless, or negligent manner by writing the Recommendation “without first inspecting the site for any potential damage that could occur due to a pesticide application.” (Notice of Proposed Action, p. 3.) The Commissioner’s decision states in the concluding paragraph that “[the] recommendation was not based on a current inspection of the 3800 block of Globe Avenue.” (Decision, p. 15.) The Commissioner’s decision states that the “evidence suggests” that appellant did not inspect the Globe Avenue site. (Decision, p. 12.) Further, the Commissioner’s decision orders appellant to pay the “full penalty”—referencing the entire penalty amount proposed in the NOPA for the alleged violation of section 11791(b). (Decision, p. 15.) Thus, the Commissioner’s decision indeed finds that appellant committed the act charged in the NOPA and appellant was afforded due process.

While it is true that the concluding paragraph also states that appellant’s Recommendation resulted in a “faulty, careless, or negligent application,” such language should

be regarded as dicta. There is no indication—such as a change in the fine amount—that the Commissioner found a separate or additional violation.¹

2. *It is faulty, careless, or negligent for a PCA to write a pest control recommendation for a site without first inspecting that site.*

Appellant argues that “an inspection of a site is not required by statute.” (Appeal, pp. 6,7.) The issue of whether an inspection is explicitly required by statute is not the relevant question, but whether a PCA would violate FAC section 11791 by failing to inspect a site prior to writing a pest control recommendation for that site. Failing to inspect a site prior to writing a recommendation for that site falls below basic PCA standards and is therefore faulty, careless, or negligent.

A PCA is any person who offers a recommendation on any agricultural use, a term defined to include the use in this instance. (Food & Agr. Code §§ 11408, 11409.) Recommendation is defined to mean the giving of instruction or advice on any agricultural use as to a particular application on a particular piece of property. (Food & Agr. Code § 11411.) PCAs are subject to demanding licensing requirements that include ongoing education and training qualifications. (Cal. Code Regs., tit. 3, § 6550.) With the exception of certain employees of local, state, or federal departments of agriculture and the University of California, employees of public agencies who offer agricultural use recommendations must possess a valid PCA license. (Cal. Code Regs., tit. 3, § 6551.) Recommendations are provided to the operator of the property, dealer, and applicator prior to the application. (Food & Agr. Code § 12003.) Among other requirements, each recommendation is required to include a warning of possible damages that could reasonably result from the pesticide application being recommended. *Id.* at subd. (f)

Logically, a PCA could not write an adequate recommendation without first inspecting the site to evaluate possible damages resulting from the proposed application. Further, although the label of the pesticide being recommended would include warnings about possible damages resulting from the proposed application, a PCA cannot bypass the inspection by attaching the label to the recommendation. A basic function of the PCA is to use the required training and education to process complex information on the pesticide label to write recommendations for a “particular application on a particular piece of property.” Writing a recommendation that advises the applicator to “read the label” would not provide a site-specific recommendation, would be inconsistent with a basic function of the PCA, and would not constitute an adequate

¹ Throughout the appeal, Lofthouse argues that because the violation charged in the NOPA does not directly concern the pesticide application and the appellant was not responsible for overseeing the application, the Commissioner’s discussion of the application to the Globe Avenue site is irrelevant. The Commissioner’s discussion of the application should be regarded as dicta in this case.

recommendation. Although the FAC does not explicitly require inspections, failing to perform such a basic function would fall below PCA standards and is therefore, faulty, careless, or negligent.

3. The Commissioner's decision that appellant wrote the Recommendation without first inspecting the Globe Avenue site is supported by substantial evidence in the record.

Appellant argues that it is "clear" and "irrefutably proven" that he inspected the Globe Avenue site. Appellant cites testimony that he is familiar with Cost Center 712 because he "routinely drives the freeways and highways within Cost Center 712 as part of his job duties," is aware of all the vegetation within Cost Center 712, and visited the site in his personal time. Additionally, appellant notes that it is his practice to review aerial photographs and digital images prior to issuing recommendations and that one of the criteria used for determining the need for a recommendation is "field observation." (Appeal, p. 6.)

The Commissioner's decision that appellant wrote the Recommendation without first inspecting the Globe Avenue site is reasonable and based on substantial evidence in the record. As stated above, the substantial evidence test requires only enough relevant information and inferences from the record to support a conclusion, even though other conclusions might also have been reached. Issues of witness credibility are the province of the Hearing Officer.

The Hearing Officer rejected appellant's argument that he inspected the Globe Avenue site when he drove by on the freeway. The Hearing Officer's determination was based on Lofthouse's own testimony that he was the driver—not a passenger—during the drive-by "inspections" and that he was driving at freeway speed. (Testimony of P. Lofthouse, tape 4, 11:27; Decision, p. 12.) The Hearing Officer also noted that photos provided by Caltrans show a sound barrier constructed along Interstate 405 that would have obscured Lofthouse's view of the trees from the freeway. (Decisions, p. 12.) Further, appellant testified that he did not keep any records of any such "inspections." (Testimony of P. Lofthouse, tape 4, 14:00; Decision, p. 8.)

On this basis, the Hearing Officer found that appellant did not inspect the Globe Avenue site. This conclusion is eminently reasonable. Lofthouse was personally responsible for writing thousands of recommendations—he estimated at least six hundred recommendations per year—for Caltrans property along more than 1100 miles of freeways. (Testimony of P. Lofthouse, tape 3, 1:50; tape 4, 12:29.) Lofthouse was apparently at one point the sole PCA employed by Caltrans and presumably wrote recommendations for the entire Caltrans system during that time. (Testimony of P. Lofthouse, tape 3, 1:15:50.) Appellant's argument that he conducted an actual

inspection of the Globe Avenue site by driving by this particular location at freeway speed with an obstructed view is simply not believable. Despite Lofthouse's conflicting testimony, there is nothing in the record to suggest that the Hearing Officer improperly accepted the County's version of the facts in making this determination.

Appellant argues that he conducted an inspection consistent with the definition provided in the Commissioner's decision. The Commissioner's decision cites the Merriam-Webster entry defining "inspect" as "...2: to examine officially." Appellant argues that he "examined the site in his official capacity." Such reasoning begs the question—the question is did he conduct an inspection, not whether he allegedly did so in his official capacity. The Hearing Officer found based on substantial evidence in the record that Lofthouse did not conduct an inspection before writing the Recommendation. The official status of Lofthouse's business has no relevance with respect to this finding.

Appellant argues that the Commissioner's decision failed to meet its burden of proof because the "Findings of Facts" section of the decision does not include facts relating to the inspection. The Commissioner's decision is required to be supported by substantial evidence in the record. The format or any other stylistic feature of the written decision is not relevant to this inquiry.

Appellant argues that the Commissioner's decision that the Recommendation was not based on a "current" inspection cannot serve as the basis for a violation because the phrase is vague, ambiguous, and not supported by the record. Appellant has failed to explain how, in this case, "current inspection" could be reasonably interpreted to mean anything other than an inspection of the Globe Avenue site made before the Recommendation was written. The Commissioner's decision is clear that appellant wrote the Recommendation without first inspecting the Globe Avenue site and is supported by substantial evidence in the record.

4. Appellant's argument that the recommendation includes all of the statutorily required information is irrelevant because appellant failed to inspect the Globe Avenue site.

Appellant argues that the recommendation includes all of the information required by FAC section 12003 and CCR title 3, section 6556. Those provisions include legal requirements that are separate from FAC section 11791. The County alleged that Lofthouse operated in a faulty, careless, or negligent manner by failing to inspect the Globe Avenue site and never alleged that appellant violated FAC section 12003 or CCR title 3, section 6556.

Appellant additionally argues that he fully complied with the requirements of a pest control recommendation because the recommendation includes warnings about the use of Milestone VM near trees and instructs applicators to read the label prior to making the application. Appellant further notes that he provided training and instruction to Caltrans staff on pest control recommendations as required by the Caltrans Maintenance Manual (manual). As discussed above, PCAs cannot substitute an inspection with instructions to read the label. The training and instruction provided to Caltrans staff are not relevant to the issue of whether Lofthouse inspected the Globe Avenue site.

5. Appellant's argument that the tree roots "trespassed" or "illegally encroached" onto Caltrans property is irrelevant and beyond the scope of this proceeding.

Appellant argues that the damaged trees' roots were illegally encroaching and trespassing into Caltrans' right-of way. It is beyond the scope of the Director's review to decide disputes of this nature. Further, as appellant correctly acknowledges, this issue is "not relevant to the question of whether Lofthouse inspected the site." (Appeal, p. 5.) The "trespass" or "illegal encroachment" of tree roots in this case is not a defense for the failure to inspect the Globe Avenue site in violation of FAC section 11791.

6. Appellant's argument that the Commissioner's decision referenced the incorrect pesticide advisory warning is irrelevant because appellant failed to inspect the Globe Avenue site.

Appellant argues that the Commissioner's decision incorrectly used language from the Milestone (reg. no. 62719- 519-AA) advisory warning instead of the Milestone VM (reg. no. 62719- 537-AA) advisory warning to show that Lofthouse reasonably should have been aware of potential harm to Chinese Elm trees resulting from the recommended application. As appellant correctly acknowledges, "[t]hese facts are not relevant to whether Lofthouse inspected the site..." (Appeal, p. 9.)

7. Appellant's argument that he fulfilled his duties as a Caltrans Landscape Specialist is irrelevant because appellant failed to inspect the Globe Avenue site.

Appellant argues that the Commissioner's decision "misconstrues" the manual by stating that the manual places additional responsibility on Landscape Specialists like Lofthouse to ensure safe pesticide applications. Appellant further argues that he provided training and instruction to Caltrans staff on pest control recommendations as required by the manual. The manual is not relevant in determining whether Lofthouse inspected the Globe Avenue site.

Conclusion

The Commissioner's decision that appellant Lofthouse violated FAC section 11791 is affirmed. The fine of \$2,500 is upheld.

Disposition

The Commissioner's decision and levy of fine is affirmed. The Commissioner shall notify appellant Lofthouse of how and when to pay the \$2,500 in total fines.

Judicial Review

Under FAC section 12999.5, Appellant may seek court review of the Director's decision within 30 days of the date of the decision. Appellant must file a petition for writ of mandate with the court and bring the action under Code of Civil Procedure section 1094.5.

**STATE OF CALIFORNIA
DEPARTMENT OF PESTICIDE REGULATION**

Dated: 6/20/2014

By: Brian Leahy
Brian Leahy, Director